SEPARATE STATEMENT OF

COMMISSIONER RACHELLE B. CHONG

Re: *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order, CS Docket No. 96-46*

It's been a long and winding road to allowing local exchange carriers (LECs) to play a broader role in the video market. There have been changes in the marketplace, unexpected legal roadblocks, regulatory contortions, and finally, a brand new statutory framework plotting a new path to our ultimate destination. Our reward at journey's end is that competition can deliver its benefits to consumers of video programming.

The Road Travelled

When our journey began two decades ago, cable television was a nascent industry. Our major goal was to provide Americans with an alternative source of video programming other than the free, over-the-air terrestrial broadcast system. At that time, the Commission had some concern that local telephone companies could monopolize this emerging industry if they were allowed to offer video programming in their telephone service areas, and guarded against this situation in our rules. In the 1984 Cable Act, Congress codified our cross ownership restrictions.[1]

Since that time, much has changed in the video marketplace. Cable has matured and surpassed expectations. Cable passes 96% of American homes. Consumers now have many more programming choices. Unfortunately, however, until recently, a single cable operator has been the only multiple video programming distributor (MVPD) in the vast majority of localities in the country. This has prompted concerns about undue market power.[2]

As time passed, the combination of a vigorous cable industry and technological advances that would permit telephone companies to provide video programming over their own plant set the stage for the Commission to reexamine telco entry into the video marketplace. Thus, in 1991, the Commission proposed to amend its telco-cable cross

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[1] Pub. L. No. 98-549, 98 Stat. 2779 (1984), 47 U.S.C. §533(b) (1984).

[2] This raised issues eventually leading to the 1992 Cable Act which sought to address undue market power of the cable operator as compared to that of consumers and video programmers. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(2), 106 Stat. 1460 (1992).

ownership rules to allow LECs to play a broader role in the video marketplace, consistent with the 1984 Cable Act.[3] We proposed to allow LECs to provide "video dialtone" service, which we envisioned as "an enriched version of video common carriage under which LECs will offer various nonprogramming services in addition to the underlying video transport."[4] We thought that a video dialtone policy would further the Commission's public interest goals of increased competition, improved infrastructure and greater diversity in video programming.[5]

When the Commission proposed its rules in 1992 for video dialtone, the key characteristic of the video dialtone system was a Title II common carrier video delivery platform capable of accommodating MVPD.[6] True to the traditional common carriage model and consistent with the 1984 Cable Act's telco-cable cross ownership restriction, we prohibited LECs from being a video programming provider (VPP) in their telephone service areas, either through the telephone operating company or through an affiliate. No cable franchise would be necessary. At the same time, we recommended to Congress that it amend the 1984 Cable Act to permit LECs, subject to appropriate safeguards, to provide

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[3] *Telephone Company-Cable Television Cross Ownership Rules, Sections 63.54-63.58, Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry*, 7 FCC Rcd 300 (1991) (*First Report & Order*), *Memorandum Opinion and Order on Reconsideration*, 7 FCC Rcd 5069 (*1992 Video Dialtone Reconsideration Order*), *aff'd*, *National Cable Television Ass'n v. FCC*, 33 F.3d 66 (D.C. Cir. 1994) (*NCTA v. FCC*).

[4] *First Report & Order* at para. 10.

[5] *First Report & Order* at para. 3.

[6] *Telephone Company-Cable Television Cross Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking*, 7 FCC Rcd 5781, 5797 at para. 29 (1992) (*Second Report & Order*), *aff'd Memorandum Opinion and Order on Reconsideration and Third Notice of Proposed Rulemaking*, 10 FCC Rcd 244 (1994), *appeal pending sub. nom. Mankato Citizens Tel. Co. v. FCC*, No. 92-1404 (D.C. Cir. filed Sept. 9, 1992) (*Video Dialtone Reconsideration Order*).

video programming directly to subscribers in their telephone service areas.[7] We cited changed circumstances and stated that if Congress repealed the ban, we would consider imposing certain safeguards on LECs providing video programming directly to subscribers.[8]

In October 1994, we affirmed the basic video dialtone framework with some modifications.[9] We repeated our recommendation that Congress repeal the telco-cable cross ownership ban, noting that with the growth of the cable industry, the risk of telephone companies preemptively eliminating competition in the video marketplace has lessened significantly. At that time, I stated that I could think of few more important public interest objectives than to pursue regulatory policies that introduce effective competition in the multichannel video programming market. I noted that by expeditiously promoting such competition, we may diminish and eventually eliminate the need for cable rate regulation.[10]

Subsequently, several federal courts declared the telco-cable cross ownership restriction unconstitutional as a violation of the First Amendment.[11] With these court decisions in hand, LECs sought to become video programmers over their video dialtone platforms, alongside competing unaffiliated video programming providers.

These developments placed a significant obstacle in the Commission's path. We had to pause as we attempted to resolve complex and difficult legal and public policy issues resulting from the court cases. In 1995, we asked how LEC provision of video programming over video dialtone platforms should be regulated in the public interest, what relevance Title VI of the Act (governing cable communications) should have, and whether

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[7] *Video Dialtone Reconsideration Order* at para. 5.

[8] *Second Report & Order* at paras. 135-143. These safeguards would have included a requirement that the video dialtone platform be available to multiple video programmers and would have placed a limit on the overall platform capacity a LEC could use to transmit its own programming.

[9] *Video Dialtone Reconsideration Order*

[10] *Video Dialtone Reconsideration Order*, Separate Statement of Commissioner Rachelle B. Chong at 2.

[11] *See Chesapeake & Potomac Tel. Co. of Virginia v. United States*, 42 F.3rd 181 (4th Cir. 1994), *rehearing denied* (Jan. 18, 1995), *cert. granted*, 115 S.Ct. 2608 (June 26, 1995), *remanded* (Feb. 27, 1996), *vacated as moot* (April 17, 1996); *US West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1995); *see also*, *United States Tel Ass'n v. United States*, No. 1:94CVO1961 (D. D.C. Feb. 14, 1995).

any provisions of Title VI ought to apply to video dialtone providers.[12] It was my view that the imposition of both Title VI cable and Title II common carriage regulation would result in overly burdensome regulation that would discourage LECs from entering the video market as a second facilities-based carrier.[13] I believed that it was crucial to provide incentives for a second wire to the home, in light of the advent of broadband technology and our commitment to competition as our general model.

The Road Ahead

In overhauling the Communications Act of 1934, Congress enacted the Telecommunications Act of 1996 (1996 Act) which seeks to promote a "pro-competitive, de-regulatory national policy framework" for the entire communications industry.[14] As to the video marketplace, the 1996 Act removed the largest roadblocks in our path, and set us on a faster and more direct route to our final destination. The 1996 Act repealed the telco-cable cross ownership restriction, repealed the Commission's video dialtone rules and policies, and added a new Section 653 establishing open video systems (OVS) framework for entry into the video marketplace. Unlike the previous law, the 1996 Act offers LECs and others several ways to enter the video marketplace, and ordered the Commission to speedily implement the new provision.

This OVS framework incorporates some of the positive aspects of the now defunct video dialtone framework. For example, it requires video transport be offered to unaffiliated VPPs in order to achieve a diversity of programming on the platform. It puts a specific statutory limit on the percentage of overall platform capacity an OVS operator could use to transmit its own programming as a VPP, so that an operator does not have the sole discretion to determine all the programming on the system.

In other ways, however, the 1996 Act opens up a new road previously closed to the Commission because of the statutory telco-cable cross ownership restrictions. At last, a LEC is specifically allowed to be a VPP on its own OVS platform. In addition, the debate as to whether video dialtone ought to be regulated as cable or common carriage is finally over. OVS, by Congressional action, is neither Title VI nor Title II but its own statutory category. Thus, video dialtone is roadkill on the road to vigorous competition in the video marketplace.

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[12] *Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Fourth Further Notice of Proposed Rulemaking*, 10 FCC Rcd 4617(1995).

[13] Indeed, some LECs have opted to become Title VI cable operators and obtain local franchises.

[14] S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1, at 1 (1996) (*Conf. Report*).

The Road Beneath Our Feet

By this action, the Commission implements the new OVS framework set forth in the 1996 Act. I am pleased that today we are reaffirming our longstanding commitment to the introduction of additional competition in the video marketplace, and to the encouragement of diversity of programming. We hope we can at last provide certainty as to our regulatory framework for LECs to become MVPDs. My objective has been to ensure that the Commission follows Congress' guideposts for the OVS framework: market entry by new service providers, enhanced competition, streamlined regulation, investment in infrastructure and technology, diversity of programming choices and increased consumer choice.[15]

In contributing to this decision, I have kept paramount in my mind that OVS will herald the convergence of video and telephony. I have consciously taken the long view. I have focused on the future competitive world created by the 1996 Act, rather than relying on outdated regulatory approaches to bring vigorous competition to the video marketplace. This view directs us towards a flexible and procompetitive approach.

I put a premium on crafting an attractive framework to provide strong incentives for LECs and others to build open video systems, as opposed to closed Title VI cable systems. It is important to me that we provide incentives for major telecommunications players to build broadband facilities-based communications systems. In a two wire world, complemented with wireless choices, consumers will have choices galore for all their communications and information needs.

It is also my goal to keep our OVS framework as simple and deregulatory as possible. Competition always ought to trump regulation, and where it does arise, the Commission ought to get out of the way, let the marketplace work, and only intercede where necessary.

I believe that the item generally succeeds in adopting this flexible and deregulatory approach. However, there are several areas where I would have gone further.

First, I would have allowed in-region cable operators to become OVS operators in the absence of effective competition. The rationale in the Order for not providing in-region cable operators this option is that Congress envisioned that OVS operators would be new entrants in established markets, competing directly with the incumbent cable operator.[16] Although there is discussion to this effect in the Conference Report, I believe

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[15] *Conf. Report* at 178.

[16] *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Second Report and Order*, CS Docket No. 96-46 at para. 24.

that the statutory language itself provides us with considerably more discretion. In this regard, I believe that it is significant that Congress did not strictly limit the construction of OVS systems to areas served by cable operators. More importantly in Section 653(a)(1), Congress gave the Commission authority to allow cable operators to become OVS operators to the extent we find it to be consistent with the public interest -- not just in areas where they face effective competition.

I believe it would be in the public interest to allow cable operators to become OVS operators, even where there is no competition. Unlike closed cable systems, where the cable operator exercises control over all of the programming on the system, open video systems are superior in achieving our goal of a program diversity because unaffiliated VPPs may obtain access to up to two-thirds of the OVS platform. Thus, in markets with only one facilities-based provider, consumers will be able to have a choice of multiple video programming providers beyond that offered on a traditional cable system. The OVS model also gives a provider of video programming services (such as a premium movie channel) more than one distribution channel in the market for its programming. Thus, I maintain that it is pro-competitive and pro-consumer to allow an operator to convert its cable system to an open video system.

I am less concerned than my colleagues about allowing in-region cable operators who do not face effective competition to have the opportunity to use the less regulatory OVS option. I believe that the rules we are adopting here will ensure fair and non-discriminatory access to the open video system platform by unaffiliated VPPs. In addition, I believe that the right of competing VPPs to obtain up to two-thirds of system capacity upon request will by itself have a deterrent effect on any anti-competitive conduct of the OVS operator.

Second, as to rates, I would have preferred to expand the number of ways in which an OVS operator could meet the presumption that its carriage rates are just and reasonable. Open video systems are still in the developmental stage. It is unclear at this time what type and level of carriage demand will exist, but I expect that it may well vary from market to market. Accordingly, I am concerned that we have provided only one way for an OVS operator to meet the presumption that its rates are just and reasonable.

Although I think that a capacity test is one reasonable indicia of a rate's reasonableness, I believe that there may well be others. For example, I believe that having a certain number of unaffiliated VPPs on the system regardless of the amount of capacity they use would indicate a reasonable rate. In addition, offering rates that are comparable to carriage rates offered by other similarly situated facilities-based VPPs may evidence a fair rate. In sum, I believe that we should have expanded the number of ways the presumption test can be met in order to avoid expensive, burdensome, and time consuming complaint cases on the rate reasonableness issue.

Finally, I would have allowed the OVS operator to require alternative dispute resolution (ADR) as a condition of carriage, so long as the terms and condition of such ADR were reasonable and non-discriminatory. I believe that ADR is an efficient and fair way to resolve disputes that may arise under Section 653. I also believe that allowing OVS operators to require ADR would have been consistent with Congress' mandate that OVS disputes be resolved in 180 days.